STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: R.A. Griffin, J.T. Neff, H.N. White

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

Supreme Court No. 119818

C.O.A. No. 221264

JONATHON JOE JONES,

L.C. No. 98-016374-FC-2

Defendant-Appellee.

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

MICHAEL D. THOMAS (P23539)
Prosecuting Attorney - Saginaw County

Submitted by:
JANET M. BOES (P37714)
Assisant Prosecuting Attorney
Saginaw County Prosecutor's Office
Courthouse
Saginaw, Michigan 48602
(989) 790-5330

LESTER O. POLLAK (P23120)
Attorney for Defendant-Appellee
306 First Street
Jackson, Michigan 49201
(517) 787-1830

TABLE OF CONTENTS

INDEX OF AUTHORITIES

JURISDICTIONAL STATEMENT

Defendant-Appellee accepts the Plaintiff-Appellant's Jurisdictional Statement.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHERE THE PROSECUTING ATTORNEY DELIBERATELY ELICITED THE FACT THAT THE ONLY EYEWITNESS TO THE CRIME HAD TAKEN AND PASSED A POLYGRAPH TEST, DID THE COURT OF APPEALS CORRECTLY RULE THAT PLAIN ERROR HAD OCCURRED, THAT THE ERROR WAS NOT WAIVED OR FORFEITED, AND THAT IT WAS NOT INVITED ERROR?

The Court of Appeals said "No."

Defendant-Appellee says "Yes."

STATEMENT OF FACTS

Defendant was convicted of first degree murder and conspiracy to commit murder, after jury trial. He was sentenced to mandatory life in prison on both counts by the Honorable Robert L. Kaczmarek, Saginaw County Circuit Judge, on July 26th, 1999. It is from this conviction and sentence that Defendant appeals as of right.

This case concerns the alleged murder and conspiracy to murder one Oliver Rodel Henderson. The prosecutor's theory was that the Defendant stomped on Henderson's face after he had been brutally beaten up by one Kim Martin. Defendant testified and denied any involvement in the incident. The only eyewitness produced to this incident itself was one Ricky Jones, who happened to be in the area walking the street when this incident occurred at 2:00 or 3:00 a.m. in the morning. Ricky Jones testified that he lived at 427 South Seventh Street in Saginaw. He stated that he knew Kim Martin as they grew up together. (64a) He stated that he had been over to see some lady that night who lived on East Genesee Street. (66a) He saw Kim Martin and Henderson in a fight on the corner of Burt and Seventh. Martin was saying, "Why did you break into my house?" (67a) The other guy was kind of tall with a slender build. He described the man as African-American and stated that he was apologizing to Martin. He stated that the man broke loose from Martin and ran down the street. Although Jones was heading home, he was looking back watching what was occurring. Martin hollered, "Stop him, Tiptoe." Tiptoe is Jones' nickname. (68-69a) He got this name because he did not have a kneecap and this made it difficult for him to run. He ran the best he could towards the individual. (69a) He stated the man had ran out of his shirt and fell in the street. (70a)

He stated that Martin was shortly behind him chasing the individual. Martin then proceeded to run up to him and started kicking him in the head with the tip of his foot. (70a) He stated that Martin kicked the individual several times in the middle of the street. The guy then got up and went into the grass and was still apologizing for breaking into the house. (70a) Martin continued constantly asking him why he broke into the home and then started proceeding to kick him some more in the grass, on the sidewalk and in the street. (70a) The man was on his knees, yet Martin proceeded to continue to kick him. It only took one shot to knock him over, but Martin continued to kick him some more. Martin then dragged the individual over to the side of the house. Jones claimed that he tried to break them up by pushing Martin off but was not successful. He estimated that Martin gave Henderson 20 to 25 head shots and stated that Henderson was out of it at the end and was no longer saying anything. (76a) He further stated that when Henderson was no longer conscious, Martin continued to kick him. Martin then knocked on Defendant's door and Defendant came out of the house. He then jumped on Henderson with both feet. (80a) Martin asked him before he jumped on him, "Do you want a piece of this?" (80a) His feet landed on Henderson's head. Jones stated that he tried to pull the Defendant back but that Defendant shrugged him off. (81a) He stated that the Defendant jumped on Henderson's head four or five times. He did not recall what type of shoes Defendant had on. He did not know how Defendant was dressed at the time. There was no mention whatsoever from the victim after he was jumped on, but he was making gurgling sounds when the Defendant jumped upon him. Jones stated that he did not know whether Henderson was missing some teeth before the incident. After Defendant jumped on Henderson, everyone left and Defendant went back into his white house and Martin went

down the street. (83a) Jones admitted he did nothing to assist the individual. (84a) He went back to his house but was locked out. His mother had locked both the locks. He then saw Martin five minutes later, who told him to call the police. (84a) He did attempt to call the police but could not get through. He went back to where he was previously and called 911 and informed the police that there was a body on Seventh Street. (86a) He waited for the police to come but the lady there told him that he had to leave. (86a) Jones then stated that he was taken downtown. (87a) He then, over objection, stated that he took a polygraph test and passed the polygraph test. (87-88a) Jones stated that he waited to break this fight up because he stated "enough is enough." (90a)

On cross-examination, Jones stated that this incident happened at 2:00 or 3:00 o'clock in the morning. He further admitted that he had drank four to five 40 ounce beers prior to this incident. He had also had approximately thirty to forty dollars worth of cocaine but he did not know for sure. (91a) It should be noted that the prosecutor in her statement of facts deliberately misleads the Court as to the extent of Jones' intoxication and cocaine use.) Jones could not remember the lady's house where he was at that evening nor did he remember telling her that he hoped the "mother fucker" was dead. (93a) But he did not deny this statement. He stated that perhaps he may have said that he should have been dead by the way he had been kicked. (93a) He further stated that the only time that he saw the Defendant was when he jumped on the victim's head four or five times. (94a) He stated that he ended up with blood on his T-shirt. He stated that that was when he was in jail and he had a pimple on him. He admitted, however, that he told them that if the blood was from Oliver Henderson, he had had no idea how the blood got there. (94a) He denied helping Kim Martin drag Henderson out of the street. At one point

he attempted to get Henderson away from Martin by pushing Martin back, but Martin got back on him and kicked him some more. (95a)

On redirect, Jones stated he started drinking around 11:00 in the morning and ingested cocaine about midnight. (96a) He denied being intoxicated amazingly enough. He admitted he may have told the lady in the house what he had observed. (100a) He stated he did not want to be caught in a predicament because he knew everyone in the neighborhood and he did not want any harsh feelings against him. (100a) He did not know the man who was being kicked. He stated he was two or three feet from him. (101a) He did not notice whether the Defendant had any blood on him that night. He stated that the man was bleeding from the face part but he did not notice any blood in the street. He stated that he picked up a tape recorder that he gave to the police, which they took.

On recross, Jones stated the reason he understood for the fight was that Henderson had broken into Martin's house but he did not know the specifics of this.

The testimony of Detective Mark Clark, called by the People, directly impacts the issue in the case at bar. Detective Clark arrived at the crime scene on Seventh Street at 6:12 a.m. The body had been removed but the crime scene had been secured. (42a) The detective executed a search warrant at 363 Fifth Street in Saginaw, which was the Defendant's residence. (47a) The search was conducted on August 16th. From the top of the dresser he ceased a pair of green pants that were later processed by the state police crime lab for DNA evidence.

On cross-examination, the detective stated that the Defendant's brother, Oscar Jones, who was at the scene when the warrant was executed, had passed away.

(51a) He stated that Julie Pryor was staying at the Defendant's residence along with her children, the Defendant, and Anita Louis. (52a) He admitted that the alleged victim, Oliver Henderson, had frequented the residence but was not sure if he stayed there overnight. (52a) He stated that during his investigation, he had contact with one Ricky Jones. The detective stated Jones had given him three different stories as to what had occurred that evening. (53a) He stated that he told different stories about what he saw. Then defense counsel had asked the detective whether he had given Jones a polygraph on two different occasions. (54a) He stated, however, that he never took a statement from the Defendant.

On redirect, the detective stated that Jones had refused to talk to him and that's why did not take his statement. (55a) He stated that Ricky Jones did not want to talk to the officer and tell him the names that were involved in the incident.

On recross, the detective admitted, however, that he had never talked to the Defendant.

The prosecutor, after this testimony, moved for a mistrial based on the fact that Defendant had brought out that Jones was given a polygraph test. The Court stated that this could be handled by a curative instruction. However, no curative instruction was given or requested. (56-57a)

David Stephens, of the Michigan State Police Forensic Laboratory, was then called by the People. Stephens preserved the blood stain on Martin's shoes. One stain was on the right shoe and two were on the left shoe. (117a) Tests were positive for human blood. He would characterize the stain as a wiped stain. (119a) He stated that the residual blood stain remained on the seam of the shoe. (120a) He typed the blood and

sent the samples for DNA testing. (129a) On the green trousers, which were seized, he noticed a red-brown stain that he suspected to be blood six inches above the bottom of the cuff or the bottom seam of the pant leg. (129a) He stated that the stain appeared to be either wiped or cleaned. It was diluted and that caused the test to be negative for human blood. Nevertheless, this was sent on for DNA analysis. (130a) He characterized the stain on the pants as a contact stain. (132a) He described this as a stain where the surface of the body would come into contact with a portion of the pants for a period of time so that some of the blood can come off of the bloodied object and be deposited into the pant leg of the slacks, and that the stain was nearly dry before the cleaning or wiping occurred. (132a) He stated that it was possible for DNA testing to be performed even though there had been some cleaning or wiping. (133a) Stephens further examined a black T-shirt identified as belonging to Ricky Jones. (134a) The test was positive for human blood. (TR 81)

On cross-examination, Stephens stated that it was impossible to tell how long the stain had been on the pants and that it could have been there for six months. (137a) He said this was the same with the other stains. He further stated that the stains on the slacks were not spatter stains as would be caused by a blow, but were rather stomping stains. (138a) He stated that there were three stains that appeared to have been made at the same time. He stated that if someone wearing those pants was being in contact with a bloody object, at least as big as the area that makes the three stains, this had to occur for a long enough period of time so that the blood could have been transferred or seeped onto the actual fabric of the slacks themselves. (138a) He further

admitted that the stain on the pants could have been made by the person wearing them from a soaking from the inside angle as opposed to the outside. (139a)

On redirect, he described the stain on Jones' shirt as big as a pinhead. (139a) He could not estimate how long it took for the stain to develop on the trousers. (140a) He clearly stated that this could not have been caused by contact with a pool of blood but three separate and distinct areas in contact with a bloody object. (140a) He further stated this appeared to him to have come from one action but they could have been independent events. (141a)

The People produced DNA lab scientist, Niebita Manhanti, The doctor performed PCR/DNA testing on a thread from Kim Martin's right shoe, stains from Kim Martin's left shoe, a particle coming from the door, the T-shirt of Ricky Jones, and the stains identified as coming from the green slacks taken from the dresser in Defendant's residence. The scientist testified that the samples matched that of the deceased, Oliver Henderson's, pattern. (253a) The random chance of a match of a black person is one in 57.4 million and the doctor stated what it means is the evidence samples match that of the deceased. (254a)

On cross-examination, the doctor admitted that he could not testify as to when the blood was placed on these objects. (255a)

The last witness presented by the People was Julie Pryor. Pryor admitted she had been convicted September 26th, 1994 for larceny in a building and attempted larceny over 100. (239a) January 15th, 1999 she had been convicted for retail fraud first degree. Julie Pryor resided in Defendant's residence along with Defendant's girlfriend, Anita Louis. She stated that she had a grandson by the Defendant's son and that she

moved back in there with them after she was evicted from her house in Bay City. (155a) Her two small children resided there as well. (156a) Oscar Jones also resided in the residence but Oscar was deceased. (157a) Pryor testified that a TV set came up missing from Defendant's residence in August. (158a) That she had stayed up until 4:00 o'clock in the morning of the incident watching TV and then went to bed. The people that were present at the time were Henderson, a lady named Val, Defendant, Anita Louis, and a guy named Mike. (159a) Val and Mike had no knowledge of what happened to the TV set. (160a) Defendant was angry but did not know who took it or anything so he just was kind of upset. (160a) She stated, however, that Defendant did recover the TV set but needed $60.00 to get it back. (170a) He stated that the people pitched in and that he got the TV back. The people that were there pitched in. (170a) Pryor denied knowing the person that the Defendant got the TV back from. (162a) Pryor stated that she did not know Deborah Martin, Kim's sister. She had seen Kim Martin once or twice at 363 South Fifth. (162a) She stated that she had seen Defendant and Martin discussing the TV set once, but that she did not catch the whole conversation. (162a) She stated that she heard that he knew who had got it and they were going to get him. (163a) She could not recall the exact words, but that was the Defendant's statement. She also said that he said something about a VCR and a video game. She stated that Kim Martin and the other people said that. (163a) Pryor denied ever hearing that Martin discussed the fact that he had other things stolen as well. (163a) She stated that the Defendant became aware of who had taken the TV but he never did tell her directly. She had overheard him speaking of that to one of his friends by the name of Keith. (164a) He told Keith that he knew who got it and that he was going to take care of it, and he said that it was Henderson. (164a)

He never stated how he was going to take care of it, however. (164a) She surmised that the person he got the TV set from may have told the Defendant who took the set. Pryor was present when a search warrant was executed by the police but could not state whether the police took any clothing from the house. She stated that there was a washer and dryer in the home, however. (166a) She identified the trousers as being Defendant's and that she had seen the Defendant wear these trousers a few times. (167a) She stated that the night of the incident she arrived home a little bit after 5:00 o'clock in the morning. (168a) Shortly after she arrived, Defendant came in the door and asked her if the police had been there. (169a) She told him no but she would have to ask Anita, as she had not been there. (169a) Defendant then looked out the window and went upstairs to change his clothes and left. (169a) He changed into some dark clothes. For a couple days after that, he was not around. She stated that she had been at the casino that morning. She further stated Defendant went to Mike's house. She took her young children to see him. (170a) She stated that when she knew Henderson, he had all his teeth. (170a) She asked Defendant at Mike's house why he did it and he replied that he took the TV and would not say anything else. (172a) She stated that he did not seem remorseful, and further stated that he never told her of any specific acts that he had done to Henderson. She stated that Defendant had said previously that he was going to hurt the person. (172a) Specifically, he said he was going to get the mother fucker and he was going to kick his ass. (172a) When asked about the police, Pryor stated the Defendant was acting scared. (173a) Later Pryor stated that Defendant said to Keith that he stomped his ass and beat his mother-fucking ass. (176a) She stated that they were both laughing and giggling about this. (178a) She stated that the Defendant said that Henderson wasn't going to steal his TV

any more. She admitted that she knew that Henderson had used drugs, specifically cocaine. She stated this seemed like a big joke to the Defendant. (178a)

On cross-examination, Pryor admitted Henderson had been over to the house on numerous occasions. She denied knowing of him to borrow anyone's clothes, but that he had brought food over to the house. (178a) She admitted knowing Martin but further stated that the Defendant had not said what he had done and what Martin had done. All he said is they stomped his m-f-g-a. Pryor stated she never talked to Martin. (180a) Pryor denied that she had ever seen Oscar in green slacks. (181a) She stated, however, that Oscar had a stroke and that he would dress himself to some extent and that she dressed Oscar after this happened. (182a) She stated that all she would do is not put the clothes on somebody but just iron them and put them on a toilet seat, which was down. She stated that he was capable of getting in and out of the shower. (183a) She did not recall Martin being mentioned as one of the two people that beat Henderson. (185a) She knew that Henderson had been beaten from the small talk with people around the house. (185a) She stated that Wendy Blackman and Anita Louis were attempting to find out Henderson's condition but did not know whether Defendant had ever called the hospital. (186a) Pryor admitted giving police a false name because she felt that she had a warrant for a ticket and could not afford to go to jail at the time. She gave a statement to the police months later. (187a)

Defendant then appealed this case to the Court of Appeals, which reversed Defendant's conviction in an unpublished Opinion dated July 12th, 2001. The prosecutor's office then sought leave to appeal, which was granted by the Supreme Court

by Order dated April 12th, 2002. In its Order, this Court granted the People's Application For Leave on one issue:

> Whether the assistant prosecutor erred in asking a key witness whether he had taken and passed a polygraph.

The Court directed the parties to address the following questions: (1) whether the assistant prosecutor erred in asking a key witness whether he had taken and passed a polygraph test; (2) whether any error was invited by the defense; (3) whether, and if so, the invited error doctrine fits into this Court's jurisprudence on forfeiture and waiver.

Argument

I. WHERE THE PROSECUTING ATTORNEY DELIBERATELY ELICITED THE FACT THAT THE ONLY EYEWITNESS TO THE CRIME HAD TAKEN AND PASSED A POLYGRAPH TEST, THE COURT OF APPEALS CORRECTLY RULED THAT PLAIN ERROR HAD OCCURRED, THAT THE ERROR WAS NOT WAIVED OR FORFEITED, AND WAS NOT "INVITED ERROR."

Standard of Review:

A decision as to whether the doctrine of waiver may apply is a matter of law and is subject to de novo review. *People v Snyder 462 Mich 38,44 n 6 (2000.)*

The standard of review for forfeiture of unpreserved error is the plain error standard. Unpreserved plain error may not be considered on appeal unless the error could have been decisive of the outcome, worked a miscarriage of justice, or falls under the category of cases where prejudice is presumed or reversal is automatic. The Defendant must bear the burden of meeting the standard for reversal where the error is unpreserved. This test applies to constitutional error as well as non-constitutional error even though it is more likely to be met when the error is of constitutional dimension. *People v Carenes 460 Mich 750 (1997); quoting with approval U.S. v Olano 507; US 725; 113 SCt 1770; 123 LEd2d 508 (1993).* Whether an error is plain is judged by the state of the law at the time of trial as any broader standard would require a judge to be clairvoyant. *Johnson v U.S. 117; SCt 1554; 137 LEd2d 718 (1997).*

The Factual and Procedural Context

The witness, Ricky Jones, was the key witness in the prosecution's case against Defendant as recognized by this Court. His testimony was crucial because he is the only eyewitness who testified as to what allegedly occurred between the victim and the Defendant. In his cross-examination of Detective Mark Clark, defense counsel established that Ricky Jones had given three different stories to Detective Clark. He then asked as follows:

> "Defense Attorney: In fact, you gave Mr. Jones a polygraph test on two different occasions?
>
> Prosecutor Sahli: Objection.
>
> The Court: Sustained.
>
> Prosecutor Sahli: May we approach?
>
> (Bench Conference)

After the jury was excused, the prosecutor moved for a mistrial. The motion was denied by the trial court. Significantly, the Court offered a cautionary instruction which was never requested by the prosecutor. (Trial TR 118-119) It should be noted that the defense never asked for the results of the polygraph only whether the test had been given. Secondly, no evidence was ever introduced on this matter at this point as the question was never answered only asked. Further, the prosecution at this point had the benefit of a sustained objection and could have received a cautionary instruction if desired, which Prosecutor Sahli declined to do. Instead of avoiding this dangerous ground as instructed, Prosecutor Sahli took a calculated risk and made the situation infinitely worse. He asked deliberately and directly:

"Prosecutor Sahli: Did you take a polygraph in this case?

Mr. Jones: Yes.

Prosecutor Sahli: Did you pass that?

Mr. Jones: Yes.

Defense Attorney: I'm going to object.

Prosecutor Sahli: This was brought up yesterday over my objection.

The Court: Sustained, sustained, sustained. Move on.
(Trial TR Vol II pp 33-34).

Thus, it is clear that the prosecutor deliberately placed the results of the polygraph test in front of the jury in an attempt to bolster the credibility of the only testifying eyewitness to this incident, Ricky Jones. Prior to this, no evidence on the issue of polygraph tests had been introduced. Jones' credibility needed bolstering as he had consumed four to five 40 ounce beers prior to the incident and had smoked 30 to 40 dollars worth of crack cocaine. In addition to this, he had given three different versions of the incident to Detective Clark.

Based upon this record, the Court of Appeals ruled as follows:

"MRE 103(a)(1) requires timely objection to improper questions. However, as indicated above, although defense counsel objected, the objection was not timely because it was not raised until after the answers were given by the witness to the two improper questions. As we noted in *Temple v Kelel Distributing Co. 103 Mich App 326, 330; 454 NW2d 610 (1990).* Such a belated objection is not timely because at the time the objection was raised, the statement was already in evidence. Nevertheless, we review the allegations of error for plain error. *Carenes supra; Grant supra.*

The present case bears striking similarity to *People v Nash 244 Mich App 93; 625 NW2d 87 (2000).* In *Nash,* the prosecutor attempted to rehabilitate a key prosecution witness by repeatedly asking why he should be believed. The prosecutor ultimately obtained the answer he solicited when the witness

responded [because] I took a lie detector test. Although counsel did not move for a mistrial, this court reviewed for plain error.

The *Nash* Court reversed and remanded for a new trial after finding plain non-harmless error had occurred.

> 'Normally, the reference to a polygraph test is not admissible before a jury. *People v Purifoy 128 Mich App 531, 535; 340 NW2d 320 (1983).* Indeed, it is a bright line rule that reference to taking or passing a polygraph test is error. *People v Kasters 175 Mich App 748, 754 ; 438 NW2d 651 (1989); Purifoy supra.* This error occurred when a prosecution witness mentioned having taken a polygraph test.' [id at 97].

As in *Nash*, the reference to the polygraph was not inadvertent. In addition, like *Nash*, Jones was the prosecution's only eyewitness. The error was prejudicial to the Defendant and seriously affected the fairness of the judicial proceeding. *Carens supra; Grant supra; Nash supra.*

After careful review of the record, we hold that the error of questioning the key prosecution witness regarding whether he took and passed a polygraph test was not harmless. On the contrary, it was plain error that warrants reversal of Defendant's convictions and remand for a new trial." (Slip Opinion p 2-3)

The Error

Reversible error was injected into this case when Prosecutor Sahli deliberately placed the results of Ricky Jones' polygraph in front of the jury. Prior to this occurring, the situation was salvageable because there was no evidence of a polygraph test being given or results therefrom before the jury. Only a question and a sustained objection. This is at best a fleeting reference to this subject especially where a cautionary instruction has been offered. It is clear that there is no reversible error at this stage of the proceeding where the defense simply asked a question relative to a polygraph. No answer was given and the objection to the question is sustained by the Court.

Neither the fact of the taking of the polygraph examination or the results therefrom are admissible at trial. *People v Barbara 400 Mich 352 (1977).* Polygraph tests are inadmissible in Michigan even if the parties stipulate to their admission. *People v Wright 74 Mich App 297 (1974).* A mistrial is not required every time a polygraph is mentioned in a criminal trial. *Poeople v Paffhousen 20 Mich App 345 (1969).* An intentional reference to polygraph examination results is inadmissible to rehabilitate a prosecution witness' testimony and constitutes a miscarriage of justice requiring reversal, even when no objection was made. *People v Rogers 66 Mich App 658 (1976).* In considering whether reference to a polygraph examination requires reversal, the Court considers five factors:

> "(1) Whether the Defendant objected to the evidence and sought a cautionary instruction.
>
> (2) Whether the reference was inadvertent.
>
> (3) Whether there were repeated references.
>
> (4) Whether the reference was an attempt to bolster the witness' credibility, and
>
> (5) Whether the results of the examination, rather than the fact that the examination had been conducted was admitted.
> *People v Kicenski 118 Mich App 341 (1981); People v Janson 116 Mich App 674 (1983); People v Kocha 110 Mich App 1 (1981).*

A careful examination reveals that there was no reversible error in these proceedings when the defense attorney merely inquired as to whether a polygraph had been given and the objection was sustained. The trial judge properly denied the prosecutor's motion for a mistrial. Looking at the factors, the prosecutor objected but refused a cautionary instruction, which at this stage would have been sufficient. The

question was not inadvertent but no answer was given. There was only one brief reference to a polygraph. This certainly was not an attempt to bolster the credibility of Ricky Jones. There was no evidence admitted as to the taking of or the results of the examination. Therefore, there was no reversible error in the proceedings until Prosecutor Sahli deliberately put it in by asking for and placing the fact of the taking and the results of the polygraph before the jury.

Plain Error Analysis and Review

There is no question that "plain error" occurred as recognized by the Court of Appeals. The law could not be clearer. Neither the fact of the taking of the polygraph examination nor the results thereof are admissible at trial. *People v Barbara supra.* An intentional reference to polygraph examination results is inadmissible to rehabilitate a prosecution witness' credibility testimony and constitutes a miscarriage of justice, requiring reversal even where no objection was made. *People v Rogers supra; people v Nash 244 Mich App 93 (2000); People v Kasters 175 Mich App 748 (1989).* Because of the lack of timely objection, the error in this case is unpreserved. This necessitates a plain error analysis under *People v Carenes supra.* Under *Carenes,* which adopted the federal standard of *U.S. v Olano,* the standard is as follows:

> "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court. The *Olano* Court emphasized that a constitutional right may be forfeited by a party's failure to timely assert the right. To avoid forfeiture under the plain error rule, three requirements must be met: (1) Error must have occurred; (2) The error was plain, i. e., clear or obvious, and (3) The plain error must have affected substantial rights. Id pp 731-734. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of lower court proceedings. Id p 734.

> It is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. Id. Finally, once a defendant has satisfied these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain forfeited error resulted in conviction of an actually innocent defendant, or when the error 'seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.' " *People v Carenes 460 Mich at 763.*

For the reasons discussed herein, there is no question that the admission of the taking and results of the polygraph are error and that the error was clear and obvious. *People v Nash supra; People v Rogers supra.* The third requirement of substantial prejudice is easily met. The Court acknowledges that Ricky Jones is the key prosecution witness in this case. (See Order Granting Leave To Appeal) Indeed, Ricky Jones is the only witness to this incident. Without the testimony of Jones, the State has no case. Jones' testimony is the only testimony linking Defendant to this incident. Indeed, the only issue for the jury to consider was "to what extent, if any, did Defendant participate in the beating of the victim?" The only testimony linking Defendant to the incident is that of Ricky Jones.

It is difficult to imagine a more unreliable witness. Ricky Jones told the police three different versions of this incident. He has a motive to lie as he does not want to be charged with participating in this murder. At the time of the incident, he is drunk, having consumed four to five 40 ounce beers. He is stoned, having consumed thirty to forty dollars worth of crack cocaine. He is wandering the streets in the early morning hours and did not recall the name of the lady he was with that evening. The polygraph evidence turned Ricky Jones, a totally incredible witness, into a credible one because he had passed a polygraph. Such unfair bolstering of a prosecution witness' testimony is

prohibited. *People v Nash supra; People v Kasters supra.* The Court of Appeals correctly found that this error was prejudicial and seriously affected the fairness of the judicial proceeding. It is difficult to see how any other conclusion can be reached. Without the testimony of Ricky Jones, this case cannot reach a jury.

The prosecution attempts to blunt this conclusion essentially by arguing the Jones' testimony is supported by other evidence. The pro-offered evidence, i.e. the bloody pants taken from Defendant's resident, the co-defendant's bloody shoes, DNA evidence, is entirely circumstantial. It may at best place Defendant at the scene but cannot answer the central question in this case - the extent of any of Defendant's participation in this crime. Indeed, Jones could not answer the question as to what Defendant was wearing that evening.

The prosecutor attempts to buttress Jones' testimony with that of Julie Pryor. This young lady has managed to commit three felonies involving theft or dishonesty in her young life. Her testimony is equally incredible. Further, Defendant had no motive to commit this heinous act as he had been paid for his TV, which was returned to him. In sum, the testimony of Julie Pryor provides little, if any, support to Ricky Jones' testimony. The circumstantial evidence does not answer the question of the extent, if any, of Defendant's participation in the incident. To convict, the jury must believe the testimony of Ricky Jones, whose testimony was bolstered by the prosecutor's intentional reference to the taking and passing of a polygraph. Defendant has shown substantial prejudice as required by the third prong of *Carenes.* This error has not been forfeited. The Court should affirm the Court of Appeals which found substantial prejudice to the rights of Defendant.

Invited Error

The prosecutor argues that the Defendant "opened the door" to the Jones polygraph testimony by asking the question to the detective as to whether the witness had been offered a polygraph test. The procedural posture of this case is extremely important in deciding this issue. First of all, no evidence was presented on this question as to whether Ricky Jones had taken and passed a polygraph. There was only a question as to whether a polygraph had been offered. The prosecutor had the benefit of a sustained objection to the question and was offered a cautionary instruction. Reversible error had not been committed at this point. Prosecutor Sahli, contrary to the judge's instructions, injected reversible error into these proceedings by deliberately eliciting and introducing the results of the polygraph tests. This is prosecutorial misconduct and is not invited error as the term has been defined by the Courts of this state and the federal courts. There are two reasons for this. First, this is not a situation where the invited error doctrine applies as no evidence was introduced on the polygraph except by the prosecutor. There was a sustained objection. Further, no tactical advantage was gained by the way of argument. Second, the prosecutor's response was not proportionate and fair as is required by the invited error doctrine if it indeed applies.

Turning to the first reason, the People have cited no authority where invited error applies where there is an unanswered question, a sustained objection, and no evidence introduced on the point to constitute invited error. The defense must first raise an improper subject and receive a responsive answer to a question or attempt to use a possible error to tactical advantage. *People v Pearson 123 Mich App 462 (1983); People v Anison 70 Mich App 70 (1976); People v Baines 68 Mich App 385 (1976);*

People v Collins 63 Mich App 374 (1975). For example, in *People v Pearson supra,* the Court held that the Defendant had opened the door to a prosecutorial response by introducing evidence as to the value of a liquor license. In *People v Anison,* the defendant could not object to the evidence introduced by a police officer where it was a proper response to a defense question. The situation was similar in *People v Collins supra.* The situation is similar where Defendant attempts to use the erroneous evidence to tactical advantage by mentioning it in his closing argument. *People v Baines supra; United States v Robinson 488, US 25; 99 LEd2d 23; 108 SCt 864 (1988).* In all of these instances, the Defendant received a significant tactical advantage - either in the form of evidence introduced or in argument before the jury. In this case, he received neither. The only "benefit" he received was a single question with a sustained objection - a passing reference at best. To qualify as invited error, there must be some evidence introduced or some argument. In this case, there was neither so the "invited error" doctrine does not apply.

Turning to the second reason why the invited error rational does not apply is that Prosecutor Sahli went way beyond what was a fair response in this case. Please keep in mind that the Court offered a cautionary instruction which he declined. Instead, he ignored the trial judge's instructions and deliberately introduced the results of the polygraph. A prosecutor's right to respond under the invited error rule of *United States v Robinson 485 US 25; 99 LEd2d 23; 108 SCt 864 (1988)* is "limited" to a fair response to the claim made by the Defendant or his counsel. *U.S. v Robinson supra, 455 US 31, 32.* In the instant case, the prosecutor went way beyond what the defense had done. He

deliberately injected reversible error in a case where there previously was none. The Court of Appeals recognized this point when it stated:

> "In his brief, the prosecutor appears to concede that the questioning was not inadvertent, according to the prosecutor:
>
> [T]he prosecutor mentioned the (polygraph) test only to counteract Detective Clark's cross-examination testimony. Once defendant asked Detective Clark whether the witness had participated in the two polygraph tests, and when the detective could not respond, the jury could infer the prosecution was objecting because Ricky Jones failed both tests. So to reopen the damage, the prosecutor argues that it is permissible to ask Ricky Jones regarding the results of the tests because the issue was previously raised by defense counsel. However, when the polygraph was first raised by the defendant, an objection by the prosecutor was sustained by the Court. Accordingly, the prosecutor was on notice when he inquired about the results of the exam that the subject of polygraph examination was not admissible. A party is not permitted to 'repair the damage' by compounding the error." (Emphasis Added - Slip Opinion footnote 1 pp 2-3)

The Court of Appeals is exactly correct on this point. To rule otherwise is to effectively transfer control of the trial from the judge to the parties, if they are allowed indiscriminately to "repair the damage" when they feel aggrieved. Also, when one considers the factors the Courts use to evaluate a reference to a polygraph test, the prosecutor has compounded the error making it reversible error. In the instant case, Defendant objected but belatedly. However, the prosecutor's reference to the exam was intentional. There were repeated references and the reference was an attempt to bolster the credibility of a key, otherwise incredible, witness. Finally, the results of the exam were placed before the jury. See *People v Janson supra; People v Rocha supra.* Taken in its full context, the prosecutor did more than repair the damage which was speculative at best. His response was disproportionate, unfair, and created the reversible error in this

case. As the Court of Appeals notes, the response "compounds the error' and is not close to being a fair response as contemplated by *US v Robinson supra.*

Waiver

The prosecution argues that because Defendant first raised the inadmissible topic of a polygraph that somehow waived the right to have this error reviewed. Under the doctrine of waiver, as "there is no error to be reviewed," she cites in support of her position the Court's decisions in *People v Carter 462 Mich 206 (2000); People v Washington 461 Mich 294 (1999); People v Riley 465 Mich 442 (2001) and Vannoy v City of Warren 386 Mich 686 (1972).* Her reliance on these decisions is misplaced for two reasons. First, this Court in *People v Carter* has consistently distinguished between the doctrine of issue forfeiture, which allows for plain error analysis and limited review of an unpreserved claim and waiver, where no appellate review is afforded a litigant. The distinction was made abundantly clear in *People v Carter supra,* where the defense affirmatively expressed satisfaction with the trial judge's improper refusal to read back requested trial testimony to the jury. The Court stated:

> "When asked by the trial court in the present case for a response to its proposed instructions, defense counsel expressed satisfaction with the trial court's decision to explain that the transcripts were not available and that the jury must rely on its collective memory. Because defense counsel approved the trial court's response, defendant has waived this issue on appeal.
>
> Waiver has been defined as the 'intentional abandonment of a known right.' (Citations omitted) It differs from forfeiture which has been explained as 'the failure to make timely assertion of a right.' One who waives his right under a rule may not then seek appellate review of a claimed deviation of those rights for his waiver has extinguished any error. (Citations omitted) Mere forfeiture, on the

other hand, does not extinguish an error." *People v Carter 462 Mich at 215.*

In the case at bar, unlike *Carter,* there was no approval of the trial judge's admission of the polygraph testimony as there was in *Carter.* Indeed, the opposite is true. Counsel objected to the testimony although he did not do so in a timely fashion. This is a classic forfeiture situation as described by *Carter supra,* i.e., the failure to make timely assertion of a right. This Court cannot rule otherwise without overruling *Carter.* It should not do so, in the instant case, where fundamental rights of the accused would rest on the fact that his counsel's objection was a split-second late.

The second reason the cases cited by the prosecutor do not apply as well is although the cases deal with waiver, they all deal with some affirmative conduct of the Defendant where he has received some substantial benefit then complains about the ruling. In *Riley,* the Defendant produced hearsay testimony then complained about it. In *Washington,* Defendant created a double jeopardy issue by failing to appear for his sentencing. In *Carter,* he affirmatively approved of the trial judge's refusal to reread testimony. In *Vannoy,* appellant sought review of an instruction that was substantially similar to one he had requested. In the instant case, Defendant asked one question. The objection to that question was sustained. No evidence was introduced as no answer was given (except by the prosecutor). Defendant received no substantial benefit. There was no testimony presented *(Riley)*, instruction given *(Vannoy)*, double jeopardy issue produced (*Washington),* or assent to a trial judge's ruling *(Carter)* to extend "waiver." Principles to situations like the instant case is both unprecedented and unwise. It diminishes the trial court's ability to control the proceedings before it. If there is no

review where an objection is simply sustained to a question, a party may then put in any evidence it chooses in response. The potential for mischief rises exponentially. In the case at bar, Prosecutor Sahli was guilty of prosecutorial misconduct. An intention reference to polygraph examination results is inadmissible to rehabilitate a prosecution witness' credibility and constitutes a miscarriage of justice, requiring reversal even when no objection is made. *People v Johnson 396 Mich 424 (1976) cert denied 429 U.S. 951 (1976).*

Conclusion

There is no doubt that error occurred in the instant case and that is unpreserved because of defense counsel's failure to object. The prosecutor converted this error from harmless error to prejudicial error when he introduced evidence of the results of the polygraph examination. Prior to this, we only have a question as to whether the witness was offered a polygraph, which was sustained by the Court and an offer of a curative instruction, which was declined by the prosecutor.

The Court of Appeals' Decision, which was based on plain error review, is clearly correct. The three prongs of *People v Carenes.* There is no question that error occurred; that it was plain, and that it affected substantial rights of the accused as found by the Court of Appeals. The sole issue before the jury in this case was "whether and to what extent Defendant participated in the beating that caused the death of the victim." Although there is some purely circumstantial evidence, this question may only be answered by the direct testimony of Ricky Jones, a thoroughly unreliable witness who was both drunk and high on cocaine at the time of the incident. In addition, he had a motive to lie and had told the police three different versions of the evening's events. His testimony only became credible when it was unfairly bolstered by the prosecutor's deliberate introduction of lie detector results.

The invited error doctrine does not apply in the instant case because the defense provided no evidence and offered no argument on this topic. There was no reversible error when the subject was first brought up. The prosecutor "compounded the error when he attempted to repair the damage by introducing the results of the polygraph test. This is akin to treating an infected finger by amputating the arm, then complaining

about the magnitude of the operation. The doctrine of invited error is clearly not in issue, because on the record the topic is not raised sufficiently to "invite" a response and the prosecutor had a remedy which he declined to use. Secondly, the response by putting facts into evidence where there was none was disproportionate and not a fair response under *United States v Robinson supra.*

Similarly, this is a classic issue forfeiture situation under *People v Carter supra* which permits limited review of an issue where counsel fails to timely object to preserve an issue. There is no approval of or assent to the trial court's actions as is necessary to waive an issue. In addition, Defendant has reviewed no substantial benefit either in the form of evidence, a ruling, argument, or a jury instruction as is necessary for the doctrine of waiver to apply.

Finally, Defendant is sitting in prison for the rest of his natural life on the testimony of an extremely unreliable witness whose testimony has been unfairly bolstered by the prosecutor's deliberate introduction of polygraph results. To rule as the prosecutor urges is not only grossly unfair but allows the prosecutor to take advantage of prosecutorial misconduct. The prosecutor was clearly on notice that he was not to pursue this topic by virtue of the sustained objection. The prosecutor is obliged to see that the trial court does not commit reversible error even if the error favors his case. *People v Denny 86 Mich App 40 (1978).* In addition, to rule that there is no appellate review in a situation such as the case at bar will effectively turn the control of the trial over to the parties who can ignore the court's rulings with impunity and effectively turn the trial judge into an inpatent figurehead.

Defendant also contends that if the Court rules as the prosecutor suggests, he has been deprived of his due process right to a fair trial and the effective assistance of counsel under the United States and Michigan Constitutions by counsel's mistake of failing to object to the admission of polygraph results in a timely manner. As Justice Cavanaugh stated in his dissenting opinion in *People v Carter:*

> "The majority provides that the crucial factor distinguishing this case from *Hawe* and *Smith* is defense counsel's acquiescence to the court rule violation. (citations omitted) Therefore, the defense counsel remained silent, thus forfeiting the error, or had he objected, thus preserving the error. Then under controlling case law, he would have been granted a new trial. Given the devastating result of the defense counsel's acquiescence under the majority analysis, defendant was denied this Sixth Amendment right to the effective assistance of counsel. *People v Pickens 446 Mich 298, 591 NW2d, 797 (1994).* Therefore, at the very least, defendant is entitled to a Gunther hearing on this issue. *People v Carter 462 Mich at 233.*

Dated: this 12th day of August, 2002.

Respectfully Submitted,

Lester O. Pollak (P23120)
Attorney for Defendant-Appellee
306 First Street
Jackson, MI 49201
(517) 787-1830

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: R.A. Griffin, J.T. Neff, H.N. White

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

Supreme Court No. 119818

C.O.A. No. 221264

JONATHON JOE JONES,

L.C. No. 98-016374-FC-2

Defendant-Appellee.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF JACKSON)

Lester O. Pollak, being first duly sworn, deposes and says that he did on the 13TH day of August, 2002 mail, by first class mail, an original and 24 copies of Appellee's Brief On Appeal - Oral Argument Requested and Appendices with Proof of Service to the Clerk of the Michigan Supreme Court.

Lester O. Pollak

Sworn and subscribed to before me this
13TH day of August, 2002.

Notary Public, Jackson County, MI
Teresa Bieszczak
My commission expires 1/10/06

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: R.A. Griffin, J.T. Neff, H.N. White

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

Supreme Court No. 119818

C.O.A. No. 221264

JONATHON JOE JONES,

L.C. No. 98-016374-FC-2

Defendant-Appellee.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF JACKSON)

Lester O. Pollak, being first duly sworn, deposes and says that he did on the 13TH day of August, 2002 mail by first class mail two copies of Appellee's Brief On Appeal - Oral Argument Requested and its Appendices with Proof of Service to Janet M. Boes, Saginaw County Prosecutors' Office, Courthouse, Saginaw, MI 48602, a single copy to Clerk, Attorney General, 116 West Ottawa, Ste. 600, Lansing, Michigan 48913, Clerk of the Michigan Court of Appeals, 109 West Michigan Avenue, Lansing, Michigan 48909, and the Saginaw County Clerk, 111 S. Michigan Ave., Saginaw, MI 48602.

Lester O. Pollak

Sworn and subscribed to before me this
13TH day of August, 2002.

Notary Public, Jackson County, MI
Teresa Bieszczak
My commission expires 1/10/06